STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS MARINE OF CANADA, LTD.,

Plaintiff-Appellant,

v

PETER HLEDIN,

Defendant-Appellee,

and

DOUGLAS MARINE CORPORATION,

Defendant-Not Participating.

UNPUBLISHED
September 11, 2003

No. 238622
Ottawa County Circuit Court
LC No. 00-036299-CK

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiff Douglas Marine of Canada, Ltd., appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this breach of contract action. We affirm.

On April 20, 1978, David Wilson and John Holden, the sole shareholders of plaintiff Douglas Marine of Canada, Ltd., together with defendant Peter Hledin, started Douglas Marine Corporation [DMC]. Shortly thereafter, one hundred shares of DMC stock were transferred to plaintiff. In 1993, after a substantial judgment from an unrelated lawsuit against DMC and defendant jointly and severally, defendant filed personal bankruptcy and filed bankruptcy for DMC. According to the DMC bankruptcy plan, all stock in the company would be cancelled. Because of this provision, plaintiff, who was also DMC's unsecured creditor in the amount of $406,000, voted against the bankruptcy plan. Shortly thereafter, defendant met with Holden and Wilson and negotiated a stock sale agreement dated March 10, 1994. The agreement provided that plaintiff would sell all of its DMC stock to defendant in exchange for a promissory note for $175,000 to be paid in four annual installments. Defendant signed the promissory note, but no money was ever paid on the note and plaintiff never transferred the stock certificate to defendant as required by the agreement. However, DMC, and Wilson and Holden individually, later voted in favor of the first amended bankruptcy plan that included a provision to cancel the stock. Five months later, on August 17, 1994, the bankruptcy court granted final confirmation of DMC's bankruptcy plan, thereby canceling all existing stock in DMC that was still owned by plaintiff.

Plaintiff then filed this suit to enforce the promissory note signed by defendant. Both parties moved for summary disposition.

The trial court granted summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant. The court found that the confirmation of the bankruptcy plan rendered the promissory note unenforceable because the stock to be conveyed was to be extinguished by the bankruptcy reorganization. The court also found that the release from the unsecured debt was not evidenced in the promissory note, and that plaintiff filed a claim for the unsecured debt with the bankruptcy court. The court concluded that there was no consideration for the promissory note and dismissed plaintiff's complaint.

Plaintiff argues that the trial court violated the parol evidence rule in considering evidence regarding the stock certificates and the stock sale agreement in its ruling on defendant's summary disposition motion. We disagree.

Where a written contract is clear and unambiguous, parol evidence of prior negotiations and representations cannot be adduced to create an express warranty and thereby vary the terms of a contract. *Salzman v Maldover*, 315 Mich 403, 412; 24 NW2d 161 (1946). Plaintiff contends that the language "Value Received" found in the promissory note is sufficient for this Court to conclude that there was sufficient consideration to enforce the note against defendant. However, consideration of the stock sale agreement together with the promissory note does not vary the terms of the note as forbidden by the parol evidence rule. Rather, the agreement more clearly defines what the "value" is that defendant was supposed to receive in exchange for his $175,000. The "value" defendant was supposed to receive was a transfer of the stock in DMC. The relevant provision of the stock sale agreement states:

> The Purchaser [defendant] shall execute a promissory note … to be delivered to Seller [plaintiff] upon Seller's delivery to Purchaser of a certificate representing all shares of the company [DMC] owned by Seller.

It is clear that the entire agreement between the parties was a simple exchange of the stock certificates for the promissory note. Plaintiff was aware that the stock would be canceled by the bankruptcy plan, but in the five months between the execution of the stock sale agreement and the confirmation of the bankruptcy plan plaintiff failed to sign over the stock certificates. Plaintiff's stock was then canceled, and so it had no consideration to provide defendant under the contract.

Alternatively, plaintiff argues that if evidence outside the promissory note is considered to determine whether defendant received consideration for the note, then evidence outside the stock sale agreement should also be considered to determine whether defendant received sufficient consideration even though he did not receive the stock certificates. We disagree. The stock sale agreement taken together with the promissory note constitutes a complete agreement without any ambiguous terms. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 616-617, n 87; 473 NW2d 652 (1991); *Orley Enterprises, Inc v Tri-Pointe, Inc*, 206 Mich App 614, 619; 522 NW2d 896 (1994). The stock sale agreement states that the stock is the consideration to be provided by plaintiff. Parol evidence is not allowable here, as it would not be used to clarify an ambiguous or unclear term, but to alter a clear and unambiguous term in the written contract. The trial court did not err by granting summary disposition to defendant on the ground of lack of consideration.

Plaintiff next argues that the trial court erred by failing to apply the doctrine of impossibility because the original stock certificate was not available to transfer to defendant. We disagree.

The doctrine of impossibility applies "in the event that unanticipated circumstances beyond the contemplation of the contracting minds and beyond their immediate control make strict performance impossible. *Bissell v LW Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). Here, plaintiff was aware that it was going to contract to transfer stock certificates as part of an agreement, and therefore plaintiff presumably actually possessed the certificates it intended to transfer. The record contains no evidence that defendant possessed or controlled the stock certificates as plaintiff alleges. The record indicates that a certificate was sent to plaintiff's Canadian counsel on or about August 14, 1978. The doctrine of impossibility is not applicable under the circumstances presented here.

Last, plaintiff argues that the trial court erred by concluding that plaintiff's claim was barred by the bankruptcy court's confirmation of the bankruptcy plan. Again, we disagree.

The court concluded that because plaintiff accepted the plan by voting in favor of it, plaintiff was bound by the terms of the plan and, therefore, plaintiff's claim to enforce the agreement violated the bankruptcy plan. Confirmation of a plan of reorganization constitutes a final judgment in all bankruptcy proceedings. *Sanders Confectionary Products v Heller Financial, Inc.*, 973 F2d 474, 480 (CA 6, 1992). All creditors and equity security holders are bound by a confirmed bankruptcy plan. 11 USC 1141(a).

Here, the plan states that "the rights and interests of stockholders shall be terminated and all existing shares shall be canceled." The plan clearly cancels plaintiff's stock, thereby impeding plaintiff's performance and justifying the cancellation of the contract by the court.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly